

DRBF Forum

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New Trends in Construction Dispute Resolution in Peru: Implementation of Dispute Boards

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Growth Industry: Reasons for a More Efficient Method

Nowadays when everything moves at such high speed, Peru's growth can be seen as less than impressive since the crisis of the late 1980s (over 20 years ago). In contrast to the claims made by some people that this growth has been admirable, it could be considered as natural and even logical that Peru has not only become stable, but today also has the reserves to withstand a global economic crisis (at least for a while). So, considering the speed with which transactions occur, it may be valid to ask why Peru

has not grown even more.

However, it is also fair to say that those who consider Peruvian growth to be something to admire have a point, given the number of *difficulties* and *disputes* in which the Peruvian State has been involved in respect of public procurement for public works. Similarly, the extent to which public construction works contribute to the growth of a country and the corresponding increase in gross domestic product (GDP) is undeniable.

In 2013, Peru invested S/. 12, 522.3 million in public works under the Public Procurement Law¹. In January this year (2014) alone, Peru has invested more than S/. 38 million in public works under this same law².

(continued on page 10)

¹ "Reporte de Contrataciones Públicas 2013". Source: SEACE. Research prepared by the Oficina de Estudios Económicos.

² "Reporte de Contrataciones Públicas – January 2014". Source: SEACE. Research prepared by the Oficina de Estudios Económicos.

“...in recent years the Peruvian State has been contracting steadily, with ever larger numbers of infrastructure works that have stimulated the economy and added value to the country. However, the economy is not the only thing to grow with increased construction activity; so too do the problems that arise during execution of contracts.”

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President's Page



Graham Easton
President
DRBF Executive
Board of Directors

Members, Supporters and Friends of the DRBF,

“The times are a-changing” For those of you who, like me, recall this famous musical refrain from Peter, Paul and Mary, it often comes to mind and no words are more apt to describe the DRBF’s current and future activities.

As most of our members are well aware, Dispute Boards are now firmly established on projects in many countries. The DB concept has crossed the threshold of initial acceptance and is moving into a period of increasing adoption and repeated use. This growth is mainly due to the remarkable success of Dispute Boards in not only resolving disputes on projects quickly and efficiently but also, and more significantly, promoting a management culture of dispute prevention and avoidance and a “best-for-project” approach by the contracting parties.

The DRBF is continuing its efforts to educate both contracting parties and Dispute Board participants to better utilise the skills and experience of their Dispute Board members, in order to avoid disputes before they arise. Many experienced DRBF practitioners are telling me that much of their work on recent Dispute Boards is changing from the traditional ‘dispute resolution’ activities to a more pro-active role in managing and facilitating the resolution of issues before they become disputes.

I recently had the pleasure of participating in the DRBF’s Regional Conference & Workshop in Johannesburg, South Africa. I also attended a DRBF Outreach Seminar in Gaborone, Botswana. It was obvious at these two meetings that change is in the air in Southern Africa. The large numbers of delegates at both events showed great interest in the ‘dispute avoidance’ role of Dispute Boards. They clearly saw this role as the future for Dispute Boards in adding value and improving the performance of the many infrastructure projects planned for the region.

A further indicator of the changing times is the upsurge in interest around the world in the use of Dispute Boards in public-private partnership (“PPP”) projects. This is a new and expanding model for the delivery of infrastructure projects, spearheaded by cash-strapped public authorities and major lenders such as the World Bank. The DRBF is at the forefront in developing the procedures necessary for Dispute Boards to operate effectively within these PPP projects. The latest developments will be discussed in some depth at the forthcoming DRBF International Conference in Singapore on May 15-17, 2014. I encourage you to attend this conference and update your knowledge of this growing area. [See page 9 for more details on the conference.]

Finally, there is a significant change about to occur within the administration of the DRBF with the imminent retirement of Steve Fox, our long-serving Administrative Manager. Steve has worked with DRBF since 1996, when the organization was formed. He has played a vital role in the growth of the DRBF into a worldwide, respected, professional group. On behalf of all DRBF members, I would like to thank Steve for his great contribution and wish him well in his retirement.

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Executive Board of Directors Meeting Schedule

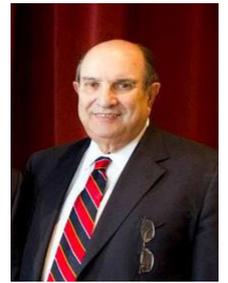
April 22
May 15
June 16
July 21

Meeting notes
from the
Executive Board
meetings are
available to all
members on the
DRBF website.

The Board of
Directors for
each region
meet on a
regular basis.
Questions or
ideas for the
Boards should be
submitted to the
Board President
directly or to
Ann McGough at
amcgough@drb.
org.



In Memoriam: Jack Woolf 1933-2014



Jack Woolf, 81, passed away after a brief illness on March 23, 2014. He was born in The Bronx, New York and was a long time resident of New Rochelle, New York, and Miami, Florida, until he settled in Charlotte in 1992. After he earned a bachelor of civil engineering from Union College, Schenectady, New York (Class of 1955), Jack worked for Turner Construction Company until 1985, when he became the Chief Executive Officer of Crow Construction, and Senior Vice President of J.A. Jones Inc., Crow's parent company. His influence in the construction industry can be seen in hotels, office buildings, hospitals, sports venues, on the skylines of New York City, Miami, Charlotte and other cities around this country.

He then founded Construction Solutions No.1 Inc., where he served as consultant to owners and contractors and performed legal counsel for projects such as the "Big Dig" in Boston. Jack was an active member of the Dispute Resolution Board Foundation for many years, serving on the Executive Board of Directors in 1996 and from 2000 to 2003. He served as President in 2001-2002.

He was a Member Emeritus of The Moles, and Fellow and Life Member of the American Society of Civil Engineers (ASCE). Jack was also a national director of the American Arbitration Society, and an active member of their National Construction Disputes Resolution Committee. In a proclamation from the American Arbitration Society, speaking to Jack's 40 years as a construction

industry professional, he was lauded for his chairmanship which "included streamlining construction arbitration, recruiting and training industry mediators and implementing state-of-the-art dispute review board procedures." From the job site to the boardroom, his leadership skills modeled fairness and equity in the profession. Jack loved being outdoors, a fan of camping, wildflowers and bird-watching. A Boy Scout as a child, he remained active in Boy Scouts, formerly serving as the Director, Greater New York Councils/Boy Scouts of America.

A quick wit and punster with a great memory, he was a crossword aficionado who completed two puzzles a day, in pen. His family recalls that he was a tinkerer, the kind of engineer who could repair anything. They also say Jack's philosophy in life was to leave everything better than he found it.

A memorial service was held in Charlotte, North Carolina on March 26, and a graveside service was held in Hawthorne, New York on March 28.

DRBF Northern California Regional Conference

The DRBF's first Northern California Regional Conference was held at the AGC of California headquarters in West Sacramento on March 26, 2014. A broad mix of 43 attendees from public works agencies, contractors, prospective DRB participants and practicing DRB members met to discuss a variety of subjects including; ADR and DRB history in California, basic tenants and operating procedures for DRBs, preparing position papers and hearings, discussions on problem projects and solutions, and dispute avoidance. Discussions and input from the attendees provided all an excellent idea of the DRB process and the many potential benefits to a project.

This conference was the result of prodding by Roger Brown starting last summer, when Roger met with Joe Keating and Carl Bauer to discuss how the DRBF could encourage other public agencies to adopt DRBs as a tool in contract administration. California Department of Transportation (Caltrans) was already one of the biggest proponents and users of DRBs with over 1,130 DRBs, having adopted the concept in the early 1990s and making them mandatory for dispute resolution on all their major projects in excess of \$10 million. This policy had reduced arbitrations filed per year from a high of over 60 to as few as 7 during the last 14 years.

Joe had done an extensive outreach to other California Public Works Departments; as a result representatives from the California Department of Water resources attended to learn more on how DRBs work and benefit the department. With the potential of major water delivery projects in the coming years in California they wanted see how DRBs could reduce claims and assist in dispute resolution. In addition there were five other new and existing agency users in attendance who are using or immediately planning on incorporating the DRB provisions into their contracts.

This conference was not designed to be a typical DRBF training session, but was primarily an outreach to new potential users of DRBs including public work departments. Caltrans had sponsored training frequently in past years so the need for formal training was not urgent at this time. It was intended as an information program with a group of very experienced people participating on the panels. The panels consisted of retired contractors, retired Caltrans employees, the Caltrans ADR Engineer, and other active DRB members. All of these panelists have participated in hundreds of DRBs for all types of public works projects both in California and other states.

The feedback from the evaluation forms by the participants provides an insight into what could be the basis for future conferences in California and elsewhere. The evaluations indicated very positive ratings for the subjects covered with an average rating of 4.3 out of 5. The overall conference rating was 4.6.

It was expressed by a significant number (7) of participants the need for a DRB training session in the future. This was discussed by our committee and some ideas will be presented to the DRBF Board for consideration. We will be considering providing both DRB training and user workshops similar to the annual Northwest Regional Conference in Seattle. In addition we will be exploring starting an annual conference in the Southern California area.

The turnout was overwhelming for a first time event of this type in California. Those of those of us who participated enjoyed the experience and believe this could be a model for the future. In addition we want to thank the AGC of California for hosting this conference.

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The Forum welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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Ethics in Today's World of DRBs:

Two DRB Members Selected by the Parties are Unable to Agree on the Selection of the Third Board Member and Chair



Jim Phillips Ph.D.
Chair
DRBF Ethics
Committee

The question posed at the end of the last column was how should a Board member selected by a party resolve a conflict with the other Board member selected by the other party on who should be selected as the third member who will serve as the Chair of the DRB?

The process for selection of DRB members varies from owner to owner and from project to project. However, a common method of selection provided for in contract documents is that the owner and the contractor each select their candidate for a Board, who is then approved by the other party, and then those two previously approved and seated members select the third member, who will serve as the chair of the DRB. In this case scenario, the two board members cannot agree on whom to select as the Chair and third member.

At the Annual Meeting & Conference in Miami, the ethics panel discussed the issue of Board selection and whether it was appropriate for a potential Board member to “lobby” to be selected to a Board themselves, or to lobby to have someone else be selected to a Board. The discussion centered on the issue of neutrality and whether such self-promotion or advocacy for another colleague to be selected was proper. On its face, this present question can be analyzed from a number of angles.

The issues of a DRB member's links with either owners or contractors and how perceptions are fueled and how they impact a DRB member's appearance of neutrality are important ones. I know

quite a few DRBF members sit on many Boards for either the same owner or the same contractor. This, on its face, provided there is full disclosure, is perfectly proper, but could lead to a perception that the individual is an “owner” member or a “contractor” member.

This question, however, is different because it brings into play the issue of the motive for the selection of a member of a DRB. Is a DRB member lobbying for someone to be selected as a way of being able to “assist” one of the parties during the project? Or is it that the potential candidate has successfully served on other DRBs and has a good reputation and/or experience? Or is it for some other reason such as an effort to “corner” the market with just a few select individuals?

One complaint I have heard among the DRBF membership over the years, and again in Miami, is that there is an appearance of a cabal to ensure some select few individuals receive the majority/all of the appointments to a new DRB, while excluding others. While this is a perception, it is difficult to determine whether this might be the case.

A cornerstone of the DRBF's Canons of Ethics found in Canon 1 is that a DRB member should be at all times during the life of the project a neutral party and avoid the “appearance of partiality” to one of the parties on the project. The question becomes: before a DRB is fully selected, is there a duty to be completely impartial to the parties in the selection of a DRB member? Another question is: does advocating for a particular candi-



date to serve on a DRB show partiality to either an owner or contractor?

Obviously, the issue of selecting DRB members is complex. The industry does business through its relationships, and if one has experience with an individual on a DRB, why should they not recommend that person for a DRB? The perception of owners and contractors plays a large role in whether a candidate who is nominated is actually approved and seated. If the owner feels that a nominee for a DRB is biased toward a specific contractor or contractors in general, there is a strong likelihood that the nominee will not be approved. I think the real task for all of us is to ensure that we do not appear to be biased toward any individual, or group of parties, but to maintain our neutrality and call the “balls and strikes” as we see them.

This brings me to a discussion of another Canon of Ethics, Canon 2. Canon 2 provides that the conduct of Board members should be above reproach and that even an appearance of a conflict of interest should be avoided. Usually we think of conflicts of interest as financial interests or stakes, including personal relationships that would have an impact on a DRB member’s neutrality. Does lobbying for a particular candidate on a DRB rise to this level? Obviously, business people provide each other referrals all of the time without any bias or expectation of a quid pro quo.

The question posed also might be just an innocent disagreement over which candidate the already selected members favor on a particular project. However, if the selection process is holding up the Board’s formation and its first meeting,

it should be possible to compromise on the selection of the third member. Since the nominee has to be approved by each party, it may be that the owner and the contractor will resolve the conflict. However, if there is undue delay, the parties to the contract may start second-guessing their earlier selections for the DRB, because of the appearance that these two Board members cannot come to a consensus decision.

One way to address a delay in the final selection is to conduct interviews of the candidates. We did this on one project on which I served, and after all of the potential candidates had been interviewed, the other Board member and I quickly settled on the individual we both preferred. An in-person conversation with potential candidates also sends the signal to the parties that you are truly looking for the best candidate to serve and are following a process to achieve this goal. It is more transparent and removes, at least in part, an appearance of favoritism.

That is the interesting aspect of appearances - they are in the minds of the observers, and two people can have totally different reactions to the same conduct. As I indicated, if this is an honest difference of opinion, then it is incumbent on the members to settle their differing opinions.

I would be interested in hearing from a reader on this question. This is another good example of a situation that does not fit into a neat category that can easily be analyzed and answered.

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ETHICS: FOR NEXT TIME

Assume that you are sitting on a DRB on a project that has been ongoing for more than two years. Also assume that the DRB has regularly scheduled meetings on site to tour the progress and hear updates from the parties. At one such meeting, both parties advise the Board that there are no disputes on the horizon, and that there are no issues that could turn into disputes. This is despite correspondence between the parties that the Board members have read that suggests that there are several issues that the parties are in disagreement about. The Board members attempt to bring these differences out by asking questions about the contents of the documents, but each party continues to deny having disputes.

The Board adjourns at the end of the day with the parties not discussing the correspondence. The very next day, the contractor's project engineer emails the DRB Chair and advises that he is requesting a formal hearing on several of the issues in question contained in the correspondence the Board had questions about.

What should the Board do?

Ethics Commentary or Question?

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DRBF Ethics Committee
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DRBF 2014 Calendar of Events

May 15-17, 2014
International Conference
Singapore

May 30, 2014
Northwest Regional Conference
Seattle, Washington

July 16-17, 2014
**DRBF Regional Conference
& Workshop**
Lima, Peru

October 23, 2014
**DRBF Training Workshops:
Administration & Practice
Advanced/Chairing Workshop**
Toronto, Canada

October 24-25, 2014
**DRBF 18th Annual Meeting
& Conference**
Toronto, Canada

Visit www.drb.org for complete event details and registration.



DRBF 14th Annual International Conference
Dispute Boards: Realising the Potential
for Dispute Avoidance
May 15 - 17, 2014
Fullerton Hotel - Singapore

The DRBF's annual International Conference attracts the top Dispute Board practitioners, employers, funding institutions, contractors, legal professionals and consultants all active in alternative dispute resolution. In 2014, the conference will be hosted for the first time in Asia, in Singapore. Day one offers full-day interactive training, with an introductory level workshop for those new to the process, and an advanced level workshop for experienced Dispute Board practitioners. The two-day conference features engaging presentations and lively panel discussions about the latest developments and issues facing the alternative dispute resolution community worldwide. Case studies, insight from the international financing institutions, and cost benefit analysis will be presented, along with insight on the future prospects for expanding the Dispute Board process in Southeastern Asia and beyond.

- ➔ **May 15 Dispute Board Workshops** - A full-day introductory workshop or practical case study workshop for advanced practitioners. Earn CPD credits!
- ➔ **May 16 & 17 International Conference** - Presentations and panel discussions.
- ➔ **May 16 Gala Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular Gala Dinner, with spectacular views of Marina Bay.

The workshop and conference will be held at The Fullerton Hotel Singapore, once home to the General Post Office, The Singapore Club and the Chamber of Commerce. Located in the heart of the financial and arts districts, the hotel successfully blends rich heritage with contemporary style and personalised service to offer a world-class accommodation experience. A limited number of rooms have been blocked for out-of-town delegates at discounted rates, and early reservations are highly recommended.

Visit www.drbf.org for details



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(continued from page 1)

SENCICO, (the National Training Service for the Construction Industry) concluded in one of its reports in 2012 that the construction sector had accumulated 10 years of continuous expansion (9.9% annual average) and had been the growth engine of the Peruvian economy³; for its part, the Ministry of Housing and Construction recently reported that the construction sector had grown by 3.2 %⁴.

In addition, it is expected that the construction sector will grow by up to 12% by the end of this year (2014). In other words, in recent years the Peruvian State has been contracting steadily, with ever larger numbers of infrastructure works that have stimulated the economy and added value to the country. However, the economy is not the only thing to grow with increased construction activity; so too do the problems that arise during the execution of contracts.

But while more construction contracts are signed for the execution of works (due to the growth just described), there are also more conflicts to be resolved. This is inevitable if we consider the nature of this activity where even with the benefit of current technology it is not always possible to foresee situations or events that come into play but that only come to light during the execution of the works.

This has created the need for more effi-

cient methods to prevent and, if necessary, resolve disputes without drastically affecting the execution of works. Only in this way we can ensure more investment and better infrastructure works.

Conflict in public works contracts in Peru and the arrival of Dispute Boards

Along with the growth of the construction sector in our country, since 1998 the successive laws that have regulated the public procurement of goods, services and works in Peru have made it mandatory to settle disputes under public works contracts through conciliation and arbitration.

Accordingly, with the aim of promoting private investment, the Peruvian State provides private entities with a neutral mechanism such as arbitration to settle disputes in their contracts⁵.

This has led to an exponential growth in arbitration in Peru since all public entities that sign contracts under the Public Procurement Law resort overwhelmingly to arbitration rather than conciliation due to its *hetero-composite* nature.

A recent study prepared by the Centre for Conflict Resolution and Analysis of the Pontificia Universidad Católica del Perú (CARC - PUCP) revealed that 69.5% of

³ For more details about the growth in the construction industry in Peru: <http://www.sencico.gob.pe/transparencia/presupuesto/2012/POI2012.pdf>.

⁴ <http://www.vivienda.gob.pe/Destacados/estadistica.aspx>.

⁵ Article 52 of the Public Procurement Law states the following:

“Article 52.- Disputes resolution

52.1 Disputes which arise among parties in relation to execution, interpretation, termination, inexistence, inefficacy, nullity or invalidity of contracts, shall be settle by conciliation or arbitration, accordingly to the agreement of parties. Conciliation must be conducted in a public conciliation center or recognized by the Ministry of Justice”.



public procurement arbitrations come from work contracts and only 19.5% from goods contracts and 11% from services contracts⁶. This demonstrates the conflictive nature of the construction business, and which is especially evident in public procurement due to the public interests involved.

On the other hand, the Public Procurement Law (both repealed and current) have excluded from their application those contracts financed by foreign co-operating entities⁷. This has resulted in the use of model construction and consultancy contracts (such as FIDIC contracts) for the resolution of disputes, as demanded by those foreign entities before agreeing to provide funding for a project.

Thus, disputes have been settled (and are today, only for these cases involving foreign investment) through the use of Dispute Boards (DB) as a pre-arbitration mechanism, establishing the possibility of subsequently submitting the disputes to arbitration under certain conditions.

However, as DB's are not well known in our country, people thought of them as a sort of conciliation in which a decision is issued. Since conciliation is an *auto-*

composite mechanism for settling disputes and does not allow the conciliator to issue a decision to resolve them, it was logical to think that the DB is a mechanism with very specific features differing from those already known in Peru.

Since 2009, the CARC - PUCP has come to know more about this mechanism, determining that what was wrongly understood as “decision-making conciliation” was actually a Dispute Board. The CARC - PUCP undertook an arduous process of researching and promoting this mechanism, convinced of the advantages that proper contractual regulation could bring to the efficiency and speed in resolving disputes in public works contracts in our country.

The CARC – PUCP Working Team: Dispute Boards

The CARC-PUCP created a Working Team of renowned experts in construction law and managers from the largest construction companies in Peru to carry out research tasks in order to promote this mechanism within the national legal community and provide an institutional management service and organization of the DB in Peru through the development of Dispute Board Rules⁸.

⁶ Research study “Tendencias en los arbitrajes de la contratación pública: análisis de laudos”, prepared in 2013 by the Centre for Conflict Resolution and Analysis of the Pontificia Universidad Católica del Perú through its lawyer Dr. Rigoberto Zuñiga Maraví.

⁷ “3.3. This law is not applicable for: (...) contracts concluded in accordance with specific procedures of international organisms, States or cooperating entities, provided that they derived from external debt transactions and/or donations linked to those transactions.”

⁸ This team was created by the director of CARC – PUCP, Dr. César Guzmán-Barrón, and it was composed by lawyers Gustavo Paredes, founder partner of NPG Abogados; Humberto Arrese, Legal Manager of COSAPI; Martín Lazo, Legal Manager of GyM; Ives Becerra, Legal Manager of Abengoa Perú; Carlos López, engineer of Nippon Koei and arbitrator; Erik Franco, Legal Sub Manager of Compañía Minera Volcán; and Rigoberto Zuñiga, rapporteur lawyer of the Working Team.



In this regard, the following events were held:

- Specialist Seminar: “Arbitration and dispute resolution mechanisms in construction contracts and infrastructure projects” (October 10, 2012).
- International Conference: “Dispute Resolution in the Construction Industry” (May 22 and 23, 2013).
- Conference: “The experience of Dispute Boards in Latin America” (July 16, 2013).

First-class speakers from Peru and abroad participated in each of the above-mentioned events. In addition, the Peruvian Society of Construction Law has contributed greatly to this work through its President, Dr. Jaime Gray.

CARC – PUCP Dispute Board Rules

The major contribution of the CARC – PUCP Working Team for the implementation of the DB in Peru has certainly been the development of the Dispute Board Rules, as a result of which the CARC - PUCP became the first Peruvian institution to offer DB management services as a mechanism for settling disputes. The Rules were introduced in May 2013.

The Dispute Board Rules are the result of an evaluation process combining CARC - PUCP experience and a review of provisions applied to DBs internationally. Contributions to the international community made by the International Chamber of Commerce (ICC) and the experience and statistics published by

the Dispute Resolution Board Foundation were also taken into account.

The development of the Rules was based on national circumstances as well as the legal and social reality prevailing in Peru. In consequence, the possibility of referring controversies to a Dispute Resolution Board (DRB) that issues binding decisions or a Dispute Adjudication Board (DAB) that issues non-binding recommendations was established in the Rules. In either case, parties may jointly decide whether the DB should act on a permanent or ad – hoc basis.

Binding decisions issued by the DRB must be immediately complied with by parties once notified or within the time stipulated by the DRB. The non-compliance with a decision is considered as a serious breach of contract. Binding decisions issued by the DRB are not final, except those which acquire such status by not being submitted to arbitration within the specified time limit.

The recommendations made by the DAB are not binding and must be complied with only if parties so wish, if it is determined in arbitration or if recommendation becomes final.

When the Dispute Board Rules are applied in cases of public procurement, a DRB is the only option available to parties.

Regulation of Dispute Boards in Public-Private Partnerships

In December last year (2013), amendments were made to the Framework Law on Public-Private Partnerships. One of these includes the DB as a dispute reso-

lution mechanism, as a stage prior to arbitration.

We believe that this statutory provision is a clear sign of the positive reception and expectations that have been generated by the DBs in our country, demonstrating in addition the value of the research and promotion undertaken by the CARC - PUCP. DBs have now become a real and effective dispute resolution method for public-private partnerships.

High expectations of including Dispute Boards in public works contracts

We trust that future amendments to the Public Procurement Law will include the DB as a dispute resolution method in public works contracts. We are confident that this will help to resolve promptly the large number (69.5%) of disputes that nowadays go to arbitration as a result of the absence of a prior mechanism to prevent or resolve them during the execution of the contract.



DRBF Regional Conference & Workshop - Lima, Peru

16 & 17 July 2014 • Westin Lima

The time is right to engage with Dispute Board practitioners in Peru and the surrounding region. Participants will take a look at the historical perspective on dispute resolution in Latin America and receive guidance on successfully establishing and operating a DB. International and local industry DB users and practitioners will share their views and there will be opportunity to network. The workshop for users and practitioners will deal in some depth with the dispute avoidance role of DBs and also DB procedures in practice.

The event will be held at the Westin Lima Hotel & Convention Center located in the heart of San Isidro, Lima's business district. Discounted hotel rates are available for those traveling from outside the immediate area. Discounted rates are available for DRBF members, and package pricing and Early Bird rates are available for all delegates.

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The 2010 Adjudication Rules of the German Institution of Arbitration

On 1 July 2010, the German Institution of Arbitration (German title: Deutsche Institution für Schiedsgerichtsbarkeit; abbreviated as “DIS”) enacted the DIS Rules on Adjudication, also referred to as the DIS Adjudication Rules (German title: DIS-Verfahrensordnung für Adjudikation 10 (AVO); abbreviated as “DIS-AVO”). Pursuant to Section 1.1 DIS-AVO, the DIS-AVO “...apply where the parties have agreed upon a project-accompanying adjudication for purposes of the settlement of differences and disputes in connection with one or several contracts pursuant to these rules.” Thus, it appears safe to say that the DIS-AVO provides rules for permanent dispute boards established at the beginning of a project. In addition, the DIS offers another set of rules for ad hoc dispute boards, the DIS Rules on Expert Determination (German title: DIS-Schiedsgutachtensordnung 10; abbreviated as “DIS-SchGO”)¹ which were enacted on 1 May 2010. Both sets of rules are available in the authoritative German version and as a convenience translation into English on www.dis-arb.de. On the one hand, these two sets of rules form part of a recent initiative of the DIS to provide interested parties with a system of conflict management. This initiative led to the enactment of five new sets of rules in 2010. On the other hand, the two sets of rules may also be seen as part of an ongoing search for effective and efficient means to solve disputes that arise during construction projects, a development

that has been intensifying in Germany for approximately ten years² and, for example, has led to the promotion of the use of dispute boards and to discussions about whether the German legislator ought to enact legislation on mandatory statutory adjudication, similar to that in the English and Welsh Housing Grants, Construction and Regeneration Act 1996.

This contribution summarizes some of the key features of the DIS-AVO without claiming to be a complete analysis of each and every provision.

Under the DIS-AVO, the default number of adjudicators is three, yet the parties may as well agree to have only one adjudicator. In case of three adjudicators, the DIS-AVO would speak of a Dispute Adjudication Board (“DAB”), and in case of one adjudicator, of a sole adjudicator. By default, the chairman of a DAB or the sole adjudicator must be a lawyer. The DIS-AVO contains detailed provisions on the nomination of the DAB members and the sole adjudicator. In short, each person to serve as sole adjudicator or DAB member is to be appointed by means of an agreement of the parties. In case such an agreement cannot be reached, a DIS Appointing Committee will serve as appointing authority. The DIS will receive a fee of EUR 250.00 for the nomination of each adjudicator. A DAB is considered to be constituted upon confirmation of

¹ Christian Stubbe, DIS-Schiedsgutachtensordnung (DIS-SchGO) und DIS-Gutachtensordnung (DIS-GO), 8 German Arbitration Journal (SchiedsVZ) 130 (2010) (for an in-depth discussion).

² A very important step in that development was a paper written by three attorneys-at-law of Siemens Legal Services; cf. Paul Hobeck, Volker Mahnken & Max Koebeke, Schiedsgerichtsbarkeit im internationalen Anlagenbau – Ein Auslaufmodell?, 5 German Arbitration Journal (SchiedsVZ) 225 (2007).



all adjudicators by the DIS Secretary General or, as the case may be, by the DIS Appointing Committee, and the DIS will receive a fee of EUR 250.00 for each confirmation. In addition, there is a fee of EUR 250.00 for a decision on the challenge of an adjudicator. Throughout the duration of the DAB's or sole adjudicator's mandate, each DAB member or sole adjudicator receives, as a rule, a monthly fee of EUR 2,400.00 and an additional variable fee at an hourly rate of EUR 300.00. All of these fees and rates are subject to VAT, if applicable.

Once the DAB³ is constituted, the DAB members are to receive a complete text of the main contract as well as further information about the project. Then, the parties and the DAB members are to hold an initial meeting to enable the DAB members to obtain detailed knowledge of the project and to determine the issues relevant for the DAB's activity. By default, the parties are to submit monthly written reports on the progress of the project. The DAB members may also request additional information at any time. Regular meetings of the parties and the DAB members are to be held, by default, every six months and preferably on site.

In case there is a dispute, each party may initiate adjudication proceedings, and thereby become the applicant, by sending a fully substantiated written request to the DAB members and to the other party, who thereby becomes the opponent. The adjudication proceedings formally commence upon receipt of this request by the chairman of the DAB. The opponent has six weeks after the commencement of

the adjudication proceedings to reply in writing to the request, and it is only then that the opponent may file counterclaims or declare a set off. After that, the applicant has three weeks, starting from the receipt of the reply, to comment on the reply. The opponent, in turn, has three weeks, starting from the receipt of the applicant's comment, to answer to that comment in writing. The parties may file further written submissions only upon an express request by the DAB. Unless the parties agree otherwise, the DAB may not - not even for serious reasons - extend the time frames for the reply to the request, the comment, and the answer. There are, however, exceptions to this rule in certain cases when the parties submit expert reports together with their submissions. Next to expert reports, the parties may submit documents and written witness statements.

The DAB will hold oral hearings upon a request by one of the parties or at the DAB members' discretion. The DAB may hear experts or other specialists only with the parties' consent. Besides, the DAB may organize the proceedings at its discretion, with the chairman presiding over the proceedings, and it may request the submission of documents, carry out site inspections, and make proposals for an amicable settlement.

Upon a request of one of the parties, the DAB may in certain cases issue preliminary rulings which shall be binding upon the parties until the DAB makes a final decision⁴. If a party does not comply with a preliminary ruling, this will constitute an intentional and severe breach

³ The terms "DAB" or "DAB members" are to be understood to refer to "sole adjudicator" as well.

⁴ The term "final" will be discussed below.



of the main contract. In addition, the parties may apply to a court for interim or securing measures relating to the subject matter of the adjudication proceedings before or after these proceedings have commenced.

The DAB may make partial and final decisions. Final decisions have to be made as quickly as possible, as a rule within four weeks after the oral hearing or, as the case may be, after receipt of the last written submission. Subject to an agreement by the parties, final decisions furthermore have to be made five months after the commencement of the adjudication proceedings, at the latest. All decisions must be made by a majority of the DAB members, and there is a possibility to file a dissenting opinion. All decisions which do not merely relate to procedural questions must be accompanied by written reasons. The DAB may also make a default decision in case that a party does not submit any briefs or does not submit them in time.

Partial and final decisions are binding upon the parties until they are set aside or altered by a decision of an arbitral tribunal or a court. If a party does not comply with a partial or final decision, this will constitute an intentional and severe breach of the main contract. If a party wants to have a DAB decision reviewed, such party must make a declaration of non-recognition. This means that the party must notify the other party and the chairman of the DAB in writing and declare to not recognize the entire decision or a part of it. This declaration must be received by the other party within one month after the receipt of the DAB decision by the party who does not

recognize it. If such declaration of non-recognition is not made, the DAB's decision becomes final and binding. If one of the parties does not abide by and comply with a final and binding decision, the other party may - even if there is an arbitration agreement - request a court to make an order for the performance of the obligation established by the DAB. If a declaration of non-recognition is made, both parties may file a claim. The declaration of non-recognition may only be withdrawn with the other party's consent.

The DIS-AVO contains detailed provisions on confidentiality. As a rule, each party is entitled to submit briefs or other documents which had been filed during the adjudication proceedings as well as DAB decisions in subsequent arbitral or court proceedings. However, oral statements of the parties or persons who had been interviewed for informational reasons may not be quoted in arbitration or court proceedings, and if they are quoted nevertheless, the arbitrators or judges - according to the DIS-AVO - may not consider them. The DAB members may not be called as witnesses for facts which were disclosed to them. However, this does not apply to facts which have become known to them during a site inspection.

It is submitted that the terminology of the DIS-AVO and especially of the English convenience translation is rather ambiguous at the moment. To illustrate this submission, Section 20.3 DIS-AVO stipulates that "[t]he parties shall comply with the preliminary rulings until the adjudicators' final decision is rendered." ("...endgültigen Entscheidung..."). Section 23.2 DIS-AVO stipulates that if



no timely declaration of non-recognition is made, "...the decision becomes final and binding." ("Andernfalls wird die Entscheidung endgültig und bindend"). Section 26.1 DIS-AVO stipulates that "[t]he dispute-related adjudication proceedings are terminated upon receipt of the adjudicators' decision by the parties or, in the case of a partial decision, upon receipt of the final decision;" ("...der abschließenden Entscheidung..."). Section 20.9 DIS-AVO reads: "Preliminary rulings lose their effect upon the rendering of the final decision by the adjudicators. To the extent that a regulation is still necessary, the adjudicators shall make the necessary determinations in their final decision." and in German reads "Mit Erlass der abschließenden Entscheidung der Adjudikatoren verlieren die vorläufigen Anordnungen ihre Wirkung. Soweit noch Regelungsbedarf besteht, werden die Adjudikatoren in ihrer abschließenden Entscheidung die erforderlichen Feststellungen treffen." As a matter of fact, both "endgültig" and "abschließend" were translated as "final" into English; as a suggestion, "abschließend" could instead be translated as "concluding". Moreover, the German version of Section 20.3 DIS-AVO implies that the DAB may render a final decision, notwithstanding that the conditions for a decision to become final are set forth differently in Section 23.2 DIS-AVO. In the light of Section 20.9 DIS-AVO, it is submitted that "endgültig" in Section 20.3 DIS-AVO should be interpreted as meaning "abschließend".

The DIS-AVO has been referred to as a considerable step on the way to giving dispute boards the same significance in Germany that they already have in other countries.⁵ Yet it appears that until the end of 2012, there have not been any dispute boards that operated under the DIS-AVO (however, there has been one proceeding under the DIS-SchGO). From an international point of view, the DIS-AVO could potentially become a further choice for parties involved in large construction projects that wish to benefit from the advantages of dispute boards. The DIS-AVO may also facilitate discussions among the international dispute board community.

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⁵ Helmut Köntges & Volker Mahnken, Die neue DIS-Verfahrensordnung für Adjudikation (DIS-AVO), 8 German Arbitration Journal (SchiedsVZ) 310, 317 (2010).

DRBF Regional Conference in South Africa: The Good, The Bad & The Ugly



Anton van Langelaar
DRBF Country
Representative for
South Africa

The first DRBF Regional Conference held in South Africa in February 2014 attracted 100 delegates and was well over-subscribed. The organisers were pleasantly surprised not only at the higher than expected registration numbers, but also the extensive geographic origins of attendees which included England, Wales, France, Italy, Australia, Romania, USA, Turkey, Nepal, Zambia, Kenya, Tanzania, Namibia, Mozambique, Botswana, Swaziland and Lesotho.

The aim was to test the assertion that contemporary DBs ensure project success through significant decreases in costs and time overruns. Also, that the vast majority of projects with DBs settle disputes without litigation or arbitration. The results then serve as direction to DB users and practitioners.

Delegates had the opportunity on the first day to hear the first-hand accounts and views of local DB users and practitioners. The workshop on the second day dealt with some more advanced topics which included dispute avoidance and DB decisions and operation.

Mr Nazir Alli, CEO of SANRAL was the keynote speaker and Mr Graham Easton, President of the DRBF Execu-

tive Board, also spoke at the conference and workshop. Nazir Alli alluded to a higher expectation from DBs in their dispute avoidance role and advocated a larger advisory role for DBs.

Andy Griffiths and Nicholas Gould presented an introduction to Dispute Boards, Mark Entwistle provided a view on international practice, and DB users in South Africa Rob Fraser, Pat Lane, Peter Taylor, and Ismail Essa gave their perspectives on DBs.

Mark Entwistle gave a stimulating and thoroughly entertaining talk on developments in non-court dispute resolution in the international arena, concluding that dispute avoidance measures will increase subject to certain criteria being met.

Peter Taylor encouraged early appointment of the DB and a wider use of the dispute avoidance role. Rob Fraser shared his experiences of various forms of DBs which included a number of significant projects in Southern Africa spanning some 20 years, concluding with a plea for the wider use of ADR on also smaller projects and a proposal for DB panels as a possible solution. Pat Lane gave an insightful talk on the ju-



ristic status of DBs in South Africa and presented case law which overwhelmingly supports enforcement of DB decisions. Ismail Essa shared their agency's very positive experiences with DBs on the multi-billion Rand Gauteng Freeway Project, summarising the criteria from the Employer's perspective, which are fundamental to success of DBs. Mike Watson concluded the presentations with some lessons learnt from serving on DBs and suggestions for improving and optimising the utilisation of DBs.

The panel discussion solicited a number of questions and comments from the floor, among which was whether there was still a role for the Engineer in the DAB environment, which Rob Fraser comprehensively responded to, while highlighting the need for integrity of the Engineer.

Before the evening cocktail, Graham Easton reviewed DRBF benefits and Sanjeev Miglani and Riaan de Witt introduced themselves as the DRBF Country Representatives for Botswana and Namibia, respectively.

Day two was devoted to more advanced topics which included the DB dispute avoidance role, DB procedures in practice and DB decisions which are objected to.

Anton van Langelaar summarised the evolution of the dispute avoidance role of DBs, including avoidance provisions in standard form contracts and DB rules. Graham Easton elaborated on the dispute avoidance role of DBs, advising on the members' role, stressing the need to be proactive and providing practical steps for successful dispute avoidance. The ensuing panel discussion was contributed to with enthusiasm from the floor.



Andy Griffiths and Mark Entwistle elaborated on the DB procedures in practice, dealing with the practical operational aspects. Fergus Blackie eloquently and accurately spoke to items not covered in the preceding presentations and also dealt with the post decision phase, when DB decisions are objected to, with the matter being referred to arbitration.

The workshop was concluded with an excellent presentation on DB experiences in Mauritius, by the DRBF Country Representative Kailash Dabeesingh.

The post-conference delegate feedback was overwhelmingly positive, indicating that the conference and workshop met and even exceed expectations. I wish to thank my fellow organising committee members: Andy Griffiths, Sam Amod and Ann McGough, our supporting organisations and sponsors, our collaborators that mobilised their contacts and colleagues and Graham Easton, Jim Perry, Murray Armes and Chris Miers for their support and advice. Thank you also to the presenters for their voluntary time in preparing and presenting.

Photos: Conference delegates in Johannesburg (opposite page); DRBF Region 2 Board member Andy Griffiths addresses questions from the audience (above).

DRBF Hosts Outreach Seminar in Gaborone, Botswana



Sanjeev Miglani
DRBF Country
Representative for
Botswana

The DRBF hosted an outreach seminar in Gaborone, Botswana immediately following the Regional Conference in South Africa. Graham Easton, Mark Entwistle, Andy Griffiths, Anton Van Langelaar and Ann McGough drove to Gaborone via Pilanasburg game park, which I am sure they enjoyed. I can assure you the viewing of live game in their natural environment is a treat for our western hemisphere friends.

A half-day seminar was arranged for 3 March 2014 by the members of DRBF along with the sponsors PPC Cement, China Railways, SSI Botswana, CCC, SMPMC, Sladden and Bakwena and Associates. All major construction industry stakeholders (Association of Arbitrators, architects and engineers) were represented along with the association of local citizen contractors and the association of ABCON contractors.

The session opened with a welcome from Major General B. Oitsile and DRBF Country Representative Sanjeev Miglani. It was a full house, with a good mixture of delegates from the government and private sectors. Government representatives include nearly all Ministries connected with the construction sector, such as Transport & Communication, Infrastructure, Science & Technology, Department of Roads, Education, Local Government, Lands & Housing etc.

Our keynote speaker, Mr M. Chamme, Deputy Attorney General (Civil Division) of Botswana, advised that the number of disputes and litigation in the construction industry in Botswana was increasing due to quality and timeous completion for various resources immaterial of fault from the Employer or

the contractor. He then addressed the participants, explaining the need for dispute resolution in Botswana as disputes leading to litigation in the construction industry were increasing and costs needs to be controlled and this was resulting in lack of productivity. The DRBF representatives then reviewed the benefits of dispute avoidance and resolution through Dispute Boards.

The question and answers session was intensive and was based on the DRBF best practices and local conditions being adopted in the region. Corruption issues and biased attitudes were discussed as certain teams being entrenched in certain departments and other persons could not be considered due to past relationships again leading to biased opinions.

DRBF representatives explained that Dispute Boards do not initiate claims; the purpose is to resolve disputes that are specifically referred to them. It was also noted that it is wise and economical to appoint the DB at the commencement of the contract. Resources and training need to be expanded in Botswana in this respect. The DRBF is considering offering a training workshop in Botswana to expand the knowledge of best practices in the local community.

A reception followed where all the attendees were able to interact with the DRBF members and network with each other.

Welcome to New DRBF Members

Member Additions December 2013 - February 2014



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Our readers love to hear DRB
success stories, challenges
facing the process, and the
latest industry news and
events.

If you have new information
about DRBs, DRBF members,
or an article to share, please
tell us! Contact Forum Edi-
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amcgough@drb.org

Deadline for the next issue:

July 1, 2014

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